AP Automotive Systems, Inc. *and* International Union, United Automobile, Aerospace and Agricultural implement Workers of America, UAW, AFL–CIO, Petitioner. Case 9–RC–17421

March 13, 2001

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on August 2, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 90 for, and 100 against, the Petitioner, with 8 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations,[1] and finds that the election must be set aside and a new election held.

For the reasons fully set forth in the attached portion of the hearing officer's report, as an appendix, we find that the Employer's captive audience speech to employees 2 days before the election contained an objectionable threat of plant closure and a prediction of the futility of union representation. The statement at issue, read by the Employer's vice president, was that

> [t]he union may give you a lot of promises but they have to come to Faurecia [the Employer's parent] to deliver them to you. However, Faurecia will not agree to anything that will hurt the Troy plant's competitive position. We would rather see the plant closed by a strike now than slowly die because we agree to something that will eventually put this plant in financial trouble. Faurecia won't do it with a union and it won't do it without a union.

It is true, as our dissenting colleague states, that the Employer is not obligated to agree to demands that would adversely effect its financial or competitive position. The Employer *is* obligated by the Act, however, to make statements to employees about their union organizational activities that are "carefully phrased on the basis of 'objective fact to convey [its] belief as to demonstrably probable consequences beyond [its] control.'" *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The Employer failed to do this in this instance. Instead, the scenario conveyed to employees was that, if they chose union representation, the Petitioner would inevitably make exorbitant demands, which would "hurt the Troy Plant's competitive position," the Employer would not agree to these demands, a strike would ensue, and the plant would close.

The Employer's speech made no reference to objective facts indicating that this scenario constituted the likely outcome of bargaining. Similarly, the speech made no reference to other possible outcomes and gave no indication of the Employer's willingness to bargain in good faith with the Petitioner. Quite simply, the employees who heard this speech would reasonably understand the Employer's message to be that they could not get anything more from collective bargaining than they could get without it and that, if they risked choosing the Petitioner to represent them, they would inevitably face a strike, plant closure, and job loss. This message created an "obvious potential for interference with employee free choice." *Unitec Industries*, 180 NLRB 51, 52 (1969) (speech by Vice President Campbell). Accordingly, we will set the election aside and direct a second election.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

I do not agree that the Employer made a threat to close or a prediction that bargaining would be futile.

The Employer's remarks were as follows:

> The union may give you a lot of promises but they have to come to Faurecia [parent] to deliver them to you. However, Faurecia will not agree to anything that will hurt the Troy plant's competitive position. We would rather see the plant closed by a strike now than slowly die because we agree to something that will eventually put this plant in financial trouble. Faurecia won't do it with a union and it won't do it without a union.

Thus, the Employer was simply saying that it would not "agree to anything that will hurt the Troy plant's competitive position." Clearly, the Employer is not required to so agree, and the Employer is privileged to state this legal truism. The Employer goes on to say that it would rather take a strike than so agree, because such an agreement would "put this plant in financial trouble." Again, an employer is free to take that position in bargaining, and the Employer is privileged to state that legal truism.

My colleagues read far more into the Employer's statements than can be gleaned from the actual language that the Employer used. The Employer did not say that

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to dismiss Petitioner's Objections 1 and 3.

the Union would "inevitably" make exorbitant demands and that a strike and plant closure would follow. Rather, the Employer said that it would not agree to "anything that will hurt the Troy plant's competitive position." Clearly, if the Union makes no demands of that character, then no strike or closure will follow. Further, my colleagues suggest that the Employer must affirmatively state that it would bargain in good faith. I know of no requirement that the employer must so state, and no case is cited for this proposition. The Employer here *did* state that it would not *agree* to demands that harmed its position. This statement is fully supported by the precise language of Section 8(d).

Accordingly, there is no retaliatory threat, and there is no prediction of futility. There is simply the statement that the Employer will not agree to economically injurious terms.

APPENDIX

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION AND RECOMMENDATIONS TO THE BOARD

Pursuant to the provisions of a Stipulated Election Agreement (the Agreement) approved by the Regional Director on June 29, 2000, an election by secret ballot was conducted among certain employees[1] of the Employer to determine whether such employees desired to by represented by the Petitioner for the purposes of collective bargaining.

Upon the conclusion of the election, a tally of ballots was made available to the parties in conformity with the Rules and Regulations of the National Labor Relations Board (the Rules and the Board), respectively, which disclosed the following results:

Approximate number of eligible voters	204
Number of void ballots	0
Number of votes cast for Petitioner	90
Number of votes cast against participating labor organization	100
Number of valid votes counted	190
Number of challenged ballots	8
Number of valid votes counted plus challenged Ballots	198

The challenged ballots are not sufficient in number to affect the results of the election.

On August 9, 2000, the Petitioner filed timely Objections to Conduct Affecting the Results of the Election (the objections) which were duly served on the Employer in conformity with the Rules.

[1] The appropriate bargaining unit (the unit) as set forth in the Agreement, is: "All full-time and regular part-time production and maintenance employees employed by the Employer at its Troy, Ohio facility, but excluding line leaders, maintenance technicians, office clerical employees, and all professional employees, guards and supervisors as defined in the Act."

Pursuant to the provisions of Section 102.69 of the Rules, an investigation of the issues raised by the objections was conducted under the direction and supervision of the Regional Director. On August 23, 2000, the Regional Director issued and served on all the parties his Report on Objections to Election, Order Directing Hearing and Notice of Hearing. In his report, he recommends that a hearing be held to resolve the issues raised by Objections 1, 2, and 3. It was further recommended that the hearing officer designated for the purpose of conducting the above-referenced hearing prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections.

Pursuant to the foregoing Report on Objections to Election, Order Directing Hearing and Notice of Hearing, a hearing was held on August 29, 2000, at Troy, Ohio, before me, the duly designated hearing officer. All parties were given full opportunity to participate, to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

Upon the entire record of the hearing, I make the following findings, conclusions, and recommendations with respect to the objections.[2]

The Objections

The objections allege, verbatim, that:

During the course of the Union's organizing drive, the Employer and its agents:

1. Threatened employees with physical harm if they supported the UAW.

2. Threatened employees with loss of work if they selected the UAW as their bargaining representative.

3. Engaged in "electioneering" near the polls.

Objection 2: In support of Objection 2, the Petitioner called Eldridge "Chip" James as a witness. James is a welder on Line 11. He was a member of the Petitioner's voluntary organizing committee. Each year the Employer shuts down the plant around the first 2 weeks of July. James recalled attending a mandatory company campaign meeting sometime after the shutdown, but before the NLRB election, which was held on Wednesday, August 2, 2000. James recalls the meeting occurring on the Monday before the election—or 2 days before—the

[2] The facts are based on the record as a whole, including a full review of the testimony, records, and exhibits with due regard to the demeanor of each witness as he testified and the logical consistency and inherent probability of the evidence presented. Although I have addressed the credibility of specific witnesses with regard to certain matters more fully as set forth in my report, the absence of a statement of resolution of a conflict in specific testimony or of an analysis of such testimony does not mean that such did not occur. See *Walker's*, 159 NLRB 1159 (1966); *Trumbull Asphalt Co. of Delaware v. NLRB*, 314 F.2d 382, 383, cert. denied 374 U.S. 808 (1963) citing as authority *U.S. v. Pierce Auto Lines,* 327 U.S. 515, 529 (1946), and *ABC Specialty Foods,* 234 NLRB 475 (1978). The Board has long held that the failure of the trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered and the hearing officer is not compelled to annotate each such finding. *Walker's*, supra; *Borman, Inc.*, 273 NLRB 312 (1984). To the extent that the particular testimony of a witness does not conform to the facts recounted such testimony is discredited and found unreliable.

election. In the meeting, the Employer's vice president, Patrick Szaroletta, spoke to employees on James' shift. The shift employees were divided into two groups of employees. James attended the second meeting for his shift. His wife, who is also an employee, attended the first meeting for the shift. Line Leader (Supervisor) Tim Hebb notified James he should attend. In attendance at the meeting in the lunchroom or break room was half the shift but James did not give a number of those in attendance.

James recalls Szaroletta saying he would "rather see the company go out on strike now and die slowly than to—uh, give up competitiveness by having the UAW in there." James testified that he took this as a threat to close.

Patrick Szaroletta, vice president of manufacturing for North America, testified for the Employer on Objection 2. He stated that he gave a speech to employees "on the Monday before the election" or July 31, 2000. The speech was given to three different groups of employees at various times to cover the different shifts. It was a prepared speech, typed out and Szaroletta testified he read it word-for-word as it was written. The entire speech was entered into evidence at the hearing. It is the first full paragraph of page 4 which the Petitioner claims is objectionable. This paragraph reads as follows:

> The union may give you a lot of promises but they have to come to Faurecia to deliver them to you. However, Faurecia will not agree to anything that will hurt the Troy plant's competitive position. We would rather see the plant closed by a strike now than slowly die because we agree to something that will eventually put this plant in financial trouble. Faurecia won't do it with a union and it won't do it without a union.

The Petitioner contends that in this paragraph there is a threat to close the facility if there is a strike. The Employer, in its brief, argues that management has the right to express its views or opinions so long as the expression of those views contain no threat of reprisal or force. The Employer clearly appears to argue in its brief that it is permissible for an employer in an NLRB election campaign to predict possible consequences of economic positions or actions. In support of this view it cites *Novi American, Inc.*, 309 NLRB 544 (1992), in which the Board considered a speech given by an employer in an election campaign which stated that if the company denied a union's demands a union could either agree or put pressure on the company and the only way the union could pressure the company was to call a strike. In that same speech, the president of the employer went on to tell employees that striking employees could be replaced by permanent replacements and that they may not have jobs when the strike was over.

In *Novi American* the speech was not found to be objectionable. The Employer also argues that Szaroletta in his comments did not say or imply that either a strike or plant closing was inevitable if employees voted for the Union.

After consideration of the matter and the positions of the parties, I find that I fundamentally disagree with the arguments set forth by the Employer in its brief.

Certainly, it is permissible for an employer in an NLRB election campaign speech to set forth possible consequences of economic actions taken by either side. Thus, it is permissible to lay out truthful scenarios as to what might happen if there is a strike. But I feel the comments contained in the paragraph in question go much further than laying out possible consequences. In my opinion the comments do have a feeling of inevitability attached to them. Thus, the comments do not set out various consequences of the action. There is only one consequence. The first sentence refers to the Union making promises that they will have to come to the Employer to make good on. This is obviously a reference to demands that the Union will make at the bargaining table if it wins the election. In the next sentence, Szaroletta reading the speech, states that the Employer "will not agree to anything that will hurt the Troy plant's competitive position." This is not a statement which sets out possible consequences of the Union's demands at the bargaining table. It sets forth *one* response only and that is that the Employer will *not* agree to anything that will hurt the company's competitive position.

Moreover, there is no definition of the point at which the Employer's competitive position is hurt. This is obviously something to be decided subjectively by the Company. Therefore, the Employer is drawing a line in the sand and stating in effect "there is a point beyond which we consider the demands of the Union would be excessive and would hurt our competitive position. We are not defining what that line is, but there is a line, and if the Union crosses that line, certain things will happen."

Up to this point in the speech, the Employer does not lay out what things would happen if the Union makes demands that the company considers will hurt their competitive position. But in the next sentence the Employer makes clear where it thinks the Union's demands will lead. The speech states, "We would rather see the plant close by a strike now, than slowly die because we agree to something that will eventually put this plant in financial trouble." That sentence indicates a strike will lead to the plant closing.

Moreover, the Employer does not lay out any of the other possible economic consequences of what it considers to be the Union's "excessive demands" and there are many. If the parties cannot reach agreement on the terms of a contract at the bargaining table, the Employer does not have to agree to the Union's terms. (It can unilaterally implement its last offer on the table, if it can establish an impasse has been reached in the negotiations implementing its last offer if there has been an impasse reached.) Thus, it can back away from the negotiations until the Union presents evidence that it is willing to change its position in some regard or there is some effort to break the impasse, although it cannot refuse to negotiate if the impasse is broken. An employer, under some circumstances, if an impasse is achieved, can lock out its employees before a union can strike. Also, an employer can continue to bargain with the union on other matters or come up with new ideas to break the impasse while employees continue to work under the existing conditions and do not go on strike. These are all options other than a strike.

Then, in the event a strike does occur, there are many more scenarios that can take place. A strike can lead to the hiring of replacements and the continuation of the business of the company while the strike is ongoing. A strike can fail and then the

strike is abandoned by the union, with the striking employees agreeing to return to work and a weakened union agreeing to accept the employer's position on contract issues. During the course of a strike, a Federal mediator can be called in to try and resolve the issues and get the parties back to work. In addition to temporary replacements being hired, permanent replacements can be hired or nonbargaining unit employees, management and salaried employees can continue to operate the business.

All of these many consequences of a possible demand by a union which the Employer considers will hurt its competitive position, or of a strike, could have been explained in the speech if the Employer was trying to predict possible scenarios of economic consequences. However, I do not believe this was the Employer's intent.

As the paragraph was read to employees there were no way out from the carefully constructed formula that the Employer has composed in this paragraph. In the event that the Union makes demands that the Employer subjectively determines will hurt its competitive position, whatever ever that means, the company would rather close the plant during a strike than slowly die. The "rather than slowly die" obviously refers to continued operation of the plant during a strike. Yet, many companies continue to operate a plant during a strike. Plant closure is seldom the outcome of a strike. As noted above, an employer can continue to operate by using temporary replacements, permanent replacements or by using supervisory and managerial personnel to man the plant.

Any logical person who read this statement or in the case of the Petitioner's witness, who heard the statement read to them, could only conclude as the Petitioner's witness James concluded, that this was a threat to close the plant if the Union went on strike.

Considering the timing of the speech just 2 days before the election and the fact that it was given to almost all employees on three shifts, the use of the phrase "plant closed" could only be intended to improperly threaten the employees with job loss in order to influence their votes in the election. The Board has stated that conduct that creates an atmosphere which interferes with the voters' choice will warrant invalidating an election. *General Shoe Corp.*, 77 NLRB 124 (1948). Certainly, threatening employees with plant closure or job loss if the union is selected as their representative and negotiations do not go the way the company wants, is a violation. See *Bardon Enterprises*, 326 NLRB 469 (1998). The situation in Objection 2 goes far beyond predictions based on circumstances beyond the Employer's control such as in *Honeywel,l Inc.*, 225 NLRB 617 (1976). The Employer made no attempt to predict all possible consequences of the Union's demands or a subsequent strike. If it had listed plant closing as one possible consequence and listed other scenarios, then it would have been a fair and lawful statement in keeping with the reasoning in *Honeywell*. But in this case the Employer did not list any more than one economic consequence resulting from union representation. It simply jumped to the idea that the Union might make unreasonable demands (as defined subjectively by the Employer) that would make it "uncompetitive" (as defined subjectively by the Employer) and that the inevitable strike that would accompany it would lead to the plant closing. There were no other options given once a strike took place. This statement clearly conveys the idea once a strike takes place if the strike is over demands which the Employer sees as unreasonable and which the Employer considers would make it uncompetitive, the Employer will close the plant. The Employer mentions it had the other option of staying open during a strike but it then ruled out this option by stating it would "rather close the plant than die a slow death." Presumably by staying open and operating during a strike, it would "die a slow death" or even if it agreed to the Union's demands, even though the strike ended, these demands would be so unreasonable granting them would inevitably force the Employer to become "uncompetitive" and then "die a slow death." These are not reasonable predictions of economic consequences.

In fact, Szaroletta further testified at the hearing that the Employer has two other union-represented plants in the Midwest. Presumably, these plants did not lose their competitive position once the Union got in, and they were able to achieve contracts with the Union. This gives more credence to the idea that the argument that the plant would eventually lose its competitiveness through excessive union demands or a strike so that it would be forced to close, was simply a smokescreen so that the Employer could link the words "strike" with "plant closed." In addition, it must be noted that this speech was given only 2 days before the election so that the timing of the speech is suspect. Threats such as this one given in campaigns have been held to interfere with an election. See *Harbor Cruises,* 319 NLRB 822 (1995), in which the employer representative told employees that the employer would go out of business if the union made certain demands for health benefits and vacation dates. See *Eldorado Tool*, 325 NLRB 222 (1997).

In conclusion, after carefully considering the testimony concerning this objection and the arguments of the parties in their briefs, I find that this paragraph of the speech in question, which the Employer admits was read to large groups of employees, constituted a threat to close the plant if the Union went on strike, as well as a prediction of the futility of attempting to reach agreement on bargaining proposals on any contract negotiations if a union should be selected as the representative of the employees. Therefore, I feel that these comments interfered with the election and warrant an order setting aside the election and I so recommend.

RECOMMENDATIONS

In conclusion, I recommend that Objections 1 and 3 be overruled and that Objection 2 be sustained. I further recommend that the election be set aside and that a second election be scheduled for the reasons stated herein. Within 14 days from the date of issuance of this report, any party may file with the Board's Executive Secretary at 1099 14th Street, N.W., Washington, D.C. 20570 an original and 7 copies of exceptions thereto. Immediately upon the filing of such exceptions the party filing same shall serve a copy thereof upon each of the other parties.